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CHARLES ELMORE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 412.

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

vs.

THE STATE HIGHWAY COMMISSION OF KANSAS,
APPELLEE.

APPEAL FROM THE SUPREME COURT
OF KANSAS.

APPELLEE'S STATEMENT OF STATUTORY AND LOCAL LAW.

WINT SMITH,
OTHO W. LOMAX,
Counsel for Appellee.

KELLEY BRIEF PTG. CO., TOPEKA

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STATEMENT OF STATUTORY AND LOCAL LAW.

Justice Burch of the Kansas Supreme Court handed the following informal order to the Clerk of the Court at the close of the session at which this cause was argued below:

> "31804 Highway Com. v. Pipeline Co.
> The parties are requested to furnish the court citations to the revised statutes 1923, Supplements, and session laws not covered by supplement, relating to pipe lines—simply a citation as R. S. 1-102, but all citations whether apparently pertinent or not."

We interpret the order of this Court restoring this cause to the docket as embracing to some extent the same request and we therefore file this separate statement on statutory and local law.

Statutes Relating to Corporations Generally.

R. S. 1933 Supp. 17-202 defines the purposes for which a corporation may be created. Clause 22 reads as follows: "The construction and maintenance of a telephone line". Clause 32: "The transportation of goods, wares or merchandise or any valuable thing". Clause 54: "For the transportation of sand by pipe lines."

The latter clause is the only place in that statute where the words "pipe lines" may be found.

R. S. 17-501 provides in part:

> "Any corporation organized under the laws of any other state, territory or foreign country and seeking to do business in this state shall make application to the State Charter Board upon blank forms supplied by the Secretary of State for authority to engage in business in this state as a foreign corporation. Such application shall set forth *** (4) The full nature and character of the business the corporation proposes to conduct in this state; *** "

R. S. 1933 Supplement, 17-403 provides in part:

> "The charter board shall make a careful investigation of each application, and shall inquire especially with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted, and a certifi-

cate setting forth that the application has been approved shall be endorsed upon the application and signed by the members of the charter board approving the same: *** "

R. S. 17-505 provides as follows:

"Any corporation organized under the laws of another state, territory, or foreign country, and authorized to do business in this state, shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state."

Following the provisions of these statutes appellant, the Pipe Line Company, on May 21, 1930, filed in the office of the Secretary of State its application for permission to engage in business in the state of Kansas. Here follows section "Fourth" as written in the application:

"The full name and character of the business in which said corporation proposes to engage within the state of Kansas is the transportation of natural gas through pipelines and the delivery of the same to distributors both within and outside of the state of Kansas."

As a part of the application as required by law appellant filed a certified copy of its Delaware charter, which is dated December 23, 1929, and which instrument contains no specific reference to any right to intersect or occupy any public highway, public lands or waters. Pertinent rights granted by this charter are:

"(b) To construct and maintain conduits and lines *** for the transportation of natural gas or oil *** .

"(d) To acquire *** construct *** own *** operate *** pipe lines."

Section "f" is a broad statement of power to own real estate, easements, rights of way and other interests in land.

"(o) To do all and everything necessary, suitable and proper for the accomplishment of any of the objects or the furtherance of any of the powers hereinbefore set forth *** ."

The application was approved May 21, 1930, by the State Charter Board and a certificate issued as follows:

"STATE OF KANSAS
Office of the Secretary of State

TO WHOM IT MAY CONCERN:

THIS IS TO CERTIFY, That the Panhandle Eastern Pipe Line Company a foreign corporation, organized under the laws of the State of Delaware, has complied with the laws of the State of Kansas relating to such corporations, and is authorized to engage in business in this State as a foreign corporation.

Witness my hand and seal.

E. A. Cornell
Secretary of State

Done at the City of Topeka, this Twenty-first day of May, 1930"
(Seal)

The general powers of corporations are enumerated in R. S. 17-601:

"Every corporation, as such, shall have power: (1) To have succession, by its corporate name, for the period limited in its charter, and when no period is

limited, for fifty years. (2) To maintain and defend judicial proceedings. (3) To make and use a common seal and alter the same at pleasure. (4) To hold, purchase, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, and also to take, hold and convey such other property, real, personal, or mixed, as shall be requisite for such corporation to acquire, in order to obtain or secure the payment of any indebtedness or liability due to or belonging to the corporation. (5) To appoint and remove such subordinate officers and agents as the business of the corporation shall require, and to allow them suitable compensation. (6) To make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock. (7) To enter into any obligation or contract essential to the transaction of its ordinary affairs. (8) To change its corporate name, without in anywise affecting its rights, privileges, or liabilities."

Power of Eminent Domain.

Section 1, Article 12 of the Constitution of the state of Kansas reads as follows:

"The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

Section 4, Article 12:

"No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

The latter section has been held not to apply to property taken for public use but only to railroads and to private corporations. Pottawatomie County v. O'Sullivan, 17 Kan. 58; Collen v. Junction City, 43 Kan. 627; Buckwalter v. School District, 65 Kan. 603; Railway Company v. City, 95 Kan. 471.

R. S. 17-618 reads as follows:

> "Lands may be appropriated for the use of macadam-road, plank-road, hospital corporation or association, telegraph, hydraulic, irrigating, milling and other manufacturing corporations using power, oil companies, pipeline companies, and for the piping of gas in the same manner as is provided in this article for railway corporations as far as applicable, and any macadam-road, plank-road, telegraph, hydraulic, irrigating, oil company, pipeline company, gas company, milling or manufacturing corporation using power desiring the right to dam or take water from any stream, to conduct water in canals or raceways or pipes, or to conduct compressed air in pipes, or to conduct oil in pipes or conduct gas in pipes, or transmit power by shafting, belting, or belting and pulleys, or ropes and pulleys, or by electrical current, or by compressed air, may obtain such right or the right of way for all necessary canals, raceways, pipes, shafting, belting and pulleys, ropes and pulleys or wires in manner as aforesaid; and such canals, raceways, pipes, shafting, belting, belting and pulleys, ropes and pulleys or wires may be laid, carried or stretched on, through or over any land or lot, or along or upon any stream of water, using so much of the water thereof as may be needed for any of the purposes aforesaid, or through any street or alley or public ground of any city of the second or third class: Provided, That no such canal or raceway shall be located through any street or alley or any public ground of any city without the consent

of the municipal authorities thereof: Provided further, That it shall be unlawful for any person or corporation to locate or construct any irrigating canal or raceway along or upon any stream of water or take and use the water of any stream in such manner as to interfere with or in any wise hinder, delay or injure any milling or irrigating improvements already constructed of located along or upon any stream of water, or to diminish the supply of water flowing to or through any established irrigating canal: Provided further, That in case of the erection of a dam, the report of the commissioners, instead of defining the quantity and boundaries of the land overflowed, shall designate particularly the height of such dam. (L. 1891, ch. 85, §1; L. 1899, ch. 95, §1; L. 1091, ch. 128, §1; L. 1917, ch. 122, §1)"

R. S. 26-101 prescribes the method of procedure which may be exercised by pipe line companies.

R. S. 66-906 and 66-907 prescribes proceedings originally intended to apply only to railroad companies.

Pipe line companies may proceed in condemnation under either statute. Knox v. Great Lakes Pipe Line Company, 135 Kan. 170, 172. The validity of condemnation proceedings by a pipe line company was challenged because the width of the right of way was not described in the case of Love v. Empire Natural Gas Company, 119 Kan. 374, 377:

"It is true, as plaintiff contends, that in condemning a right of way for a railroad the proceedings must show the land taken, including the width of the right of way. However, an appropriation for a right of way for a railroad vests in the railroad company the right to the surface of a strip of land with all the trees and soil necessary for the con-

struction, maintenance and operation of its railroad. It may appropriate sufficient of the surface for its main tracks, sidetracks, depots, water tanks and other necessary appliances, and for these purposes its right of occupancy is exclusive. It is therefore essential that the extent of the land taken shall be definitely determined. In an appropriation for a pipe line the surface of the land is not taken. The pipes are buried in the ground at a depth which will not interfere with the use of the land for agricultural purposes, and the surface may thereafter be used by the owner. After the line is constructed the surface will not be used by the company except for inspection and for occasional repairs when they become necessary. The use for pipe-line purposes, therefore, differs materially from that of a railroad right of way, and probably in view of this difference the legislature made an exception and provided that the mode and manner of condemning a right of way for a railroad should be used only so far as they were applicable."

The uncompensated right to use certain city streets for pipe lines was challenged in LaHarpe v. Gas Company, 69 Kan. 97. We quote from the opinion written by Chief Justice Johnston, pages 102, 103:

"In this statute the privilege of laying gas-pipes in the streets, alleys and public grounds of cities of the second and third class is directly conferred on corporations organized to produce and distribute gas. The power to confer the privilege and to prescribe the conditions upon which it may be exercised is not delegated to the city, nor is its consent required. In the section questioned, the legislature, after providing for the condemnation of a right of way for canals, race-ways, and pipes, as well as shafting, belting, pulleys, and wires, through streets, alleys and

public grounds of cities, added 'that no such canal or race-way shall be located through any street or alley or any public ground of any city without the consent of the municipal authorities thereof.' (Gen. Stat. 1901, §1366.) In effect, this was a declaration that the consent of the city was not necessary to the exercise of any of the other uses mentioned. Having the question of municipal consent under consideration in the conduct of water by canals and raceways, of gas and air by pipes, of electricity by wires, and the transmission of power by shafting, belting and ropes through the streets, alleys, and public grounds, it made the consent of the municipality essential only as to the conduct of water in canals and raceways, and by the clearest inference indicated that such consent should not be necessary in any other case.

"It is argued with much force that the interests and safety of the public would be better subserved if excavations could not be made, and pipes could not be laid, in the streets of a city except with the consent and under the supervision of municipal officers. If we were acting in a legislative capacity we might readily agree with this claim, but that is a matter for the determination of the legislature alone, which, as has been said, is the 'master of its own discretion.' In the control of the streets and highways the power of the legislature is supreme and unlimited, except so far as it may be restricted by constitutional provisions."

Generally, as to the right of pipe line companies to occupy highways with their lines, see State v. Natural Gas Company, 71 Kan. 508. The court says at page 509:

"The right of the gas company to bury its pipes in the public highway for the transportation and distribution of gas depends largely upon the effect such use would have on the subsequent use of the

highway as a thoroughfare for public travel. It may be said that the gas company could not, and did not, as against the state, obtain from the abutting fee-owners any right to use the public highway for any purpose. Its use belongs to the public and not to the owners of adjoining property. It is true that there are some privileges which such an owner may exercise for the betterment of the adjacent estate, but he has no power to transfer to another any right to occupy the highway for any purpose."

Also on page 510:

"The contention of the state is that the use which the gas company is making of the highway is exceptional, and may be exercised only under a franchise from the state, mediately or immediately. We think this is an overstatement of the proposition. The use is not exceptional. The transportation of commodities on the highway is one of the uses for which it has always been maintained. The means, however, used by the gas company in the transportation of its gas are exceptional. A demand for this method has not heretofore existed in this state; but shall this fact alone deprive the defendant of the use of the highway for a usual and proper purpose, unless such use necessarily obstruct, seriously inconvenience or endanger public travel? In McCann v. Telephone Co., 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171, it was held that the use of a rural highway by a telephone company was not an additional servitude for which the owner of the fee could recover compensation. Speaking of the general use of a highway, the court said:

'It is variously defined or held to be for passage, travel, traffic, transportation, transmission, and communication *** . The use is not to be measured by the means employed by our ancestors, or by the conditions which existed when high-

ways were first devised. The design of a highway is broad and elastic enough to include the newest and best facilities of travel and communication which the genius of man can invent and supply.' (Page 213)"

The syllabi in the case of State v. Weber, 88 Kan. 175, are as follows:

"1. The transmission of an electric current by wire on a highway in order to furnish light, heat and power to the inhabitants residing along such electric line is a legal and proper use of a highway.

"2. A person may build and maintain such a line on a rural highway without having obtained a franchise or special license from any officer, providing it is done in a way that will not seriously impede or endanger public travel or unnecessarily interfere with the reasonable use of the highway by other members of the public and there is no invasion of the rights of the owners of abutting lands.

"3. If such a line should be so built and maintained as to substantially interfere with the legal and proper use of the highway by others of the public, or if the appliances set up and used in the highway constituted a nuisance, the state, at the instance of the attorney-general or county attorney, might maintain an action to enjoin the continuance of the nuisance or the further illegal use of the highway."

Statutory Obligations.

Beyond the provisions of the statute, R. S. 1933 Supp., 68-415, the validity of which is challenged in this case, there are absolutely no statutory obligations or regulations imposed upon pipeline companies with respect to the manner of the construction, maintenance or opera-

tion of their lines, whether located upon, along or across public highways or private lands. There are statutes which refer to pipelines and these will be listed hereafter but they cannot have any application in this controversy. The only statutes relating to the manner of the occupancy of the public highways by transmission lines of any nature (other than railroads) are as follows:

> R. S. 17-1901: "Poles, wires and fixtures. Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters."
>
> R. S. 66-183: "Wires along highways. All public utilities owning or operating wires for the transmission of telegraph or telephone messages or for the transmission of electricity upon, along, or across the streets, highways or public places in this state are required to so use, string and maintain such wires as to avoid unreasonable injury or interference from the wires of other utilities and to avoid unreasonable injury to and interference with the wires of other utilities, and the public utilities commission is given the power, and it is hereby made its duty, to prescribe reasonable rules and regulations with respect to the stringing and maintaining of wires in all cases where there is danger or possibility of unreasonable interference with or damage to the wires or service of one utility by those of another utility and with respect to the support, maintenance; repair and reconstruction thereof, which rules shall be furnished to any interested person upon application to the public utilities commission, and the

public utilities commission is given the power, and it is hereby made its duty to prescribe reasonable rules and regulations with respect to the stringing of wires, electric or otherwise, which cross over or under the tracks of any railroad company and with respect to the support, maintenance, repair and reconstruction thereof, which rules shall be furnished to any interested person upon application; but in no case shall the height of any wires which cross above the tracks of a railway company be less than twenty five feet from the top of the rails, except trolley and feed wires of electric railroads, which wires shall be not less than twenty two feet above the tops of the rails."

Other statutes relate to city streets.

The Public Utilities Act.

The Public Utilities Act, Chap. 66 R. S. 1923, relates generally to public utilities and the fixing of rates and of public service regulations by the Public Utilities Commission (now the State Corporation Commission, ~~Chap. 66~~ R. S. 1933 Supp. 74-602.

R. S. 66-156 authorizes the Public Utilities Commission to:

" *** from time to time carefully examine and inspect the condition of each public utility and common carrier, and of its equipment and the manner of its conduct and the management with reference to the public safety and convenience. *** "

R. S. 66-157:

"Whenever in the judgment of the public utilities commission it shall appear that any corporation or company operating a public utility or common car-

> rier *** or whenever in the judgment of the commission any repairs are necessary upon its road, or any addition to its rolling stock or other equipment, or any addition to or change of its stations, station houses, or other buildings or equipment, or any change in its rates for transporting passengers or freight, or for furnishing any other service, or any change in the mode of operating or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said commission shall inform such company or corporation of the improvements and changes which they deem to be proper by a notice thereof in writing, ***. "

We interpret the latter two sections as intended to apply only to railroads and to public utilities who enjoy municipal franchises in cities.

The Kansas Supreme Court has said in regard to these two statutes:

> "Pending the decision of this case argument was invited on this question: Has the state public utilities commission jurisdiction to inquire into and determine whether or not the means taken or about to be taken by a railroad company to restore a highway which is crossed by its track to a suitable condition for travel are such as to meet the requirements of the situation; and if they are found unsuitable, to direct the company to construct a crossing upon plans determined by the board to be essential to the safety of the traveling public? Each party has expressed the belief that no such power is possessed by the board. Only one side of the question having been argued, no decision of it is made."
>
> State, ex rel. v. Railway Co., 95 Kan. 22, 30-31.

Later it was held that the utilities commission was without authority to enforce an order made by it regarding a farm crossing in the case of Railway Company v. Utilities Commission, 98 Kan. 667, wherein it was said:

> "And yet we see so many expedient reasons why the public utilities commission should have primary control of matters of this sort. If no central state control is exercised over the construction of private farm crossings (and there must be hundreds of them in this state), there may be defective construction of crossings; there may be so many of them that the safe and expeditious transportation of passengers and property will be seriously impeded and human life imperiled. These considerations would almost tempt a court to read this power into the statutes conferring authority upon the commission to regulate and supervise the affairs of the railroads. We must not do so, however, for we know very well that such is the business of the legislature and not of the judiciary."

The two sections referred to above have been amended since the two cases last above cited were decided, but they were only amended to include all public utilities as defined in R. S. 66-104 and common carriers as defined in R. S. 66-105.

R. S. 66-104:

> "The term 'public utilities' as used in this act shall be construed to mean every *** company *** that *** may own, control, operate or manage, except for private use, any equipment *** for the transmission of telephone messages *** or the conveyance of oil and gas through pipe lines in or through any part of the state *** ."

R. S. 66-105:

> "The term 'common carriers', as used in this act, shall include all railroad companies, *** pipe line companies and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state."

We conclude that because the public utilities act was enacted to provide control of rates and services and because of the purely interstate character of appellant's business, none of the terms of the Public Utilities Act apply to appellant.

Miscellaneous Statutes Involving Transmission Lines.

R. S. 12-841 refers generally to cities and franchises for public utilities.

R. S. 12-842 authorizes cities of the second or third class to place pipelines, wires and other equipment for transportation of natural gas, petroleum, oil, electric current and water along and across any of the public roads, highways and streets. This statute provides that such lines shall be placed "in such manner as not to incommode the public in the use of such roads, highways and streets.

R. S. 12-844 authorizes cities of the second and third class to maintain transmission lines between various water, power or other plants and the city where the pumping or generating plants are located outside of the city limits.

R. S. 12-845 provides for condemnation for right of way for pipelines intended for city use.

R. S. 12-846 relates to procedure.

R. S. 12-849 authorizes city of the second or third class, by ordinance, to grant various transmission companies the right to enter streets and alleys, public parks and grounds of the city.

R. S. 12-106 relates to franchises for public utilities as also does

R. S. 13-434.

R. S. 13-432 defines punishment for persons found guilty of interfering with public utilities' property.

R. S. 13-1201 to 13-1204 relates to public utilities.

R. S. 13-2801 and 14-1701 relate to franchises for public utilities in cities.

R. S. 55-101 authorizes the owners of land not within an incorporated city which has been platted in lots and blocks to install, maintain and operate in the streets dedicated by the owners, lines for the transmission of electricity and fuel. This applies only to the owners of sub-divisions.

R. S. 55-208 refers to liens of sub-contractors.

R. S. 55-306 relates to the county gas inspector, an appointive county office which has long since been forgotten. It provided for a gas inspector to inspect natural gas pipelines, to discover leaks therein and require their repair.

R. S. 55-307 makes it unlawful for any person or persons to refuse to permit the gas inspector to inspect natural gas wells or pipelines.

R. S. 55-501 declares all pipelines built or maintained for the conveyance of crude oil within the State of Kansas to be common carriers.

R. S. 60-505 refers to causes of action against common carriers.

R. S. 79-422 relates to taxation of utilities.

R. S. 79-701 to 79-711 relates to taxation of wire, power and pipeline companies.

R. S. 17-623 relates to sewer corporations in cities.

R. S. 13-806 to 13-808 applies to city waterworks.

R. S. 44-505 extends the application of the Workmen's Compensation Act to pipeline companies.

R. S. 55-207 creates a lien for labor and material.

CONCLUSION.

Aside from statutes relating to city streets and public utilities owned by municipal corporations, appellee submits that R. S. 17-1901 relating only to "magnetic telegraph lines" is the only statutory authority in Kansas, beyond the statute in question in this case, which purports to either regulate or authorize the occupancy of public highways by either pipe lines, pole lines or transmission lines of any similar nature. True, the highest court of the state has held such uses to be proper where they do not necessarily obstruct, seriously inconvenience or endanger public travel. That court has, as we have seen, on several occasions mentioned the advisability of statutory regulation, yet until the enactment of the statute here challenged, the subject has entirely escaped legislative action.

Appellant enjoys all of the rights and privileges extended in Kansas to any business corporation whether organized in that state or elsewhere. Further than these rights it may and does occupy any and all highway right of way, public lands and waters necessary for its purposes. The State of Kansas has in excess of 124,000 miles of public highways and actually furnishes thousands of miles of free right of way for pipe lines, telephone, telegraph and electric power lines. The act in question applies only to state highways which are the principal highways of the state and compose a system of 8690 miles. The state has extended to all such companies the right of eminent domain, ordinarily exclusively a sovereign perrogative.

Even in the absence of statute or judicial requirements, transmission companies similarly situated would seem to be under moral duty to in some manner reciprocate for the extraordinary rights and privileges which the state has so generously and freely bestowed.

It is not unreasonable to assume that when appellant applied for authority to do business in this state and commenced construction of its pipe and private telephone line, it knew it must of necessity cross and intersect railroads, private easements of others and public highways; that it knew that public highways sufficient a few years ago are insufficient today and that further changes will be required by public necessity as units of transportation are improved and become more numerous; that it knew that the old familiar right angle turns

on highways were being eliminated by the acquisition and utility of new and additional right of way.

Appellant admits that it will be unnecessary for it to acquire new right of way to accommodate necessary structural changes in its lines. In other words the uses of the parties in the same land are in no wise inconsistent except where considerations of public safety require structural alterations in its lines as well as in the design and location of public highways. Under these circumstances did not appellant acquire its rights from the state and its rights in land subject to the changing needs and requirements of the public and the needs and requirements in the interest of its safety?

Respectfully submitted,

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Topeka, Kansas,
Its Attorneys.